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DEPARTMENT OF TRANSPORTATION

Office of the Secretary

[Docket No. DOT-OST-2022-0123]

Notice That the Build America, Buy America Requirement for Construction Materials Applies Effective November 10, 2022, and Notice of Proposed Waiver of That Requirement for a Narrow Category of Contracts and Solicitations

ACTION: Notice; Request for Comments.

SUMMARY: The Department of Transportation (DOT) seeks to maximize the use of American-made products and materials in all federally funded projects as part of the Biden-Harris

Administration's implementation of the Build America, Buy America Act (the Act), which was included in the historic Bipartisan Infrastructure Law (BIL). The implementation of this law will transform DOT's approach to domestic procurement requirements and is designed to drive significant investment in domestic manufacturing, spur job creation and grow the economy. The Department is taking three concurrent actions: (1) DOT is not extending its temporary waiver for construction materials, making that requirement applicable effective November 10, 2022; (2) in a separate notice, DOT is proposing a narrow waiver for de minimis costs, small grants, and minor components; and (3) in this notice, DOT is proposing to take two actions to help transition to the new construction materials standard. First, for DOT awards obligated on or after the effective date of the final waiver, DOT is proposing to waive the construction materials requirements for any contracts entered into before November 10, 2022. Second, DOT is proposing to waive the construction materials requirements for any contracts entered into before March 10, 2023, that result from solicitations published before May 14, 2022.

DATES: Comments must be received by November 20, 2022. Late-filed comments will be considered to the extent practicable.

ADDRESSES: Please submit your comments to the Federal eRulemaking Portal at

<http://www.regulations.gov/>, Docket: **DOT-OST-2022-0123**.

Note: All submissions must contain the agency name and the docket number. All submissions received, including any personal information therein, will be posted without change or alteration to <http://www.regulations.gov>. For more information, you may review DOT's complete Privacy Act Statement published in the Federal Register on April 11, 2000 (65 FR 19477).

FOR FURTHER INFORMATION CONTACT: For questions about this notice, please contact Darren Timothy, DOT Office of the Assistant Secretary for Transportation Policy, at darren.timothy@dot.gov or at 202-366-4051. For legal questions, please contact Michael A. Smith, DOT Office of the General Counsel, 202-366-2917, or via e-mail at michael.a.smith@dot.gov.

SUPPLEMENTARY INFORMATION:

BACKGROUND

In January 2021, President Biden issued Executive Order 14005, titled "Ensuring the Future is Made in All of America by All of America's Workers," launching a whole-of-government initiative to strengthen Made in America standards. The Executive Order states that the United States Government "should, consistent with applicable law, use terms and conditions of Federal financial assistance awards and Federal procurements to maximize the use of goods, products, and materials produced in, and services offered in, the United States." DOT is committed to ensuring strong and effective Buy America implementation consistent with Executive Order 14005 and has a long track record of successfully applying Made in America standards to support American workers and businesses through its more than \$70 billion in grant programs and \$700 million in direct purchases in FY 2020.

On November 15, 2021, President Biden signed the Infrastructure Investment and Jobs Act (IIJA or the Bipartisan Infrastructure Law), Pub. L. No. 117-58, which includes the Build

America, Buy America Act (BABA). IIJA div. G §§ 70901-27. The Bipartisan Infrastructure Law not only makes an historic investment in American transportation—from roads and bridges to rail to transit—but also greatly strengthens Made in America standards. Specifically, BABA expands the coverage and application of Buy America preferences in Federal financial assistance programs for infrastructure. BABA requires that no later than May 14, 2022—180 days after the date of enactment—the head of each covered Federal agency shall ensure that “none of the funds made available for a Federal financial assistance program for infrastructure ... may be obligated for a project unless all of the iron, steel, manufactured products, and construction materials used in the project are produced in the United States.” IIJA § 70914(a).

BABA provides that the preferences under Section 70914 apply only to the extent that a domestic content procurement preference as described in Section 70914 does not already apply to iron, steel, manufactured products, and construction materials. IIJA § 70917(a)–(b). This provision allows Federal agencies to preserve existing Buy America policies and provisions that meet or exceed the standards required by BABA.

One of the new Buy America preferences included under BABA is for construction materials. By May 14, 2022, each covered Federal agency must ensure that all manufacturing processes for construction materials used in federally assisted infrastructure projects occur in the United States. None of the specific statutes that apply particular Buy America requirements to the Federal financial assistance programs administered by DOT’s Operating Administrations specifically covers construction materials, other than to the extent that such materials would already be considered iron, steel, or manufactured products. IIJA § 70914.

In addition to establishing Buy America preferences, BABA also provides certain statutory authorities for the Made in America Office (MIAO) in the Office of Management and Budget (OMB). IIJA §§ 70915(b), 70923. MIAO was first established by Section 4 of Executive Order 14005. MIAO’s authorities under the Bipartisan Infrastructure Law include issuing

guidance to assist in applying BABA's requirements and issuing standards that define the term "all manufacturing processes" in the case of construction materials. IIJA § 70915.

On April 18, 2022, OMB issued memorandum M-22-11, "Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure" (Implementation Guidance). Under Section VIII of the Implementation Guidance, "construction materials" includes:

an article, material, or supply—other than an item of primarily iron or steel; a manufactured product; cement and cementitious materials; aggregates such as stone, sand, or gravel; or aggregate binding agents or additives—that is or consists primarily of:

- non-ferrous metals;
- plastic and polymer-based products (including polyvinylchloride, composite building materials, and polymers used in fiber optic cables);
- glass (including optic glass);
- lumber; or
- drywall.

Implementation Guidance at 13-14.

The Implementation Guidance states that "an article, material, or supply should only be classified into one of the following categories: (1) iron or steel; (2) a manufactured product; or (3) a construction material. For ease of administration, an article, material, or supply should not be considered to fall into multiple categories." *Id.* at 6. The Implementation Guidance also explains that "items that consist of two or more of the listed materials that have been combined together through a manufacturing process, and items that include at least one of the listed materials combined with a material that is not listed through a manufacturing process, should be treated as manufactured products, rather than as construction materials." *Id.* at 14. OMB characterizes its guidance on which materials are construction materials as "preliminary and non-binding guidance ... so that agencies can begin applying Buy America requirements to those materials." *Id.* at 13.

Section 70915(b) of BABA requires OMB to issue standards that define “all manufacturing processes” for construction materials. Section VIII of the Implementation Guidance provides that, “[p]ending MIAO’s issuance of final standards on construction materials, and absent any existing applicable standard in law or regulation that meets or exceeds these preliminary standards, agencies should consider ‘all manufacturing processes’ for construction materials to mean the final manufacturing process and the immediately preceding manufacturing stage for the construction material.” Implementation Guidance at 14. After considering information received through stakeholder and industry outreach, MIAO will issue further guidance that identifies initial manufacturing processes for each type of construction material that should be considered as part of “all manufacturing processes.” *Id.* Agencies are also directed to “consult with MIAO, as needed, to ensure that any waiver issued for construction materials is explicitly targeted and time-limited, in order to send a clear market signal that additional standards for ‘all manufacturing processes’ in the case of construction materials will be forthcoming.” *Id.*

In April 2022, DOT opened a public docket (DOT-OST-2022-0047) to receive comments in response to DOT’s proposal to waive the construction materials requirement for 180 days, to allow for a longer transition period. On May 19, 2022, DOT issued a temporary waiver of the construction materials requirement for 180 days: from May 14 until November 10, 2022. 87 FR 31931. In the waiver notice, DOT stated its expectation that States, industry, and other participants establish procedures to document compliance.

During the waiver period, DOT is continuing its engagement to help facilitate the creation of robust enforcement and compliance mechanisms and to rapidly encourage domestic sourcing of construction materials for transportation infrastructure improvements. On July 28, 2022, DOT issued a Request for Information (RFI) seeking input from the public, including DOT’s project sponsors, their contractors and offerors, manufacturers, labor unions, transportation and trade associations, and other interested parties on implementing BABA’s new

construction materials requirement. 87 FR 45397. DOT asked the public to submit comments to the same docket DOT used to propose the 180-day waiver.

Based on its review of comments received on the RFI and other engagement opportunities with stakeholders, and consistent with the purpose of the temporary transitional waiver, DOT does not intend to modify or extend the existing DOT waiver for construction materials. As a result, DOT awards obligated on or after November 10, 2022, from financial assistance programs for infrastructure projects will be subject to the BABA requirement that construction materials used on those projects be produced in the United States.

THE NEED FOR A WAIVER

The Implementation Guidance states that a “waiver in the public interest may be appropriate where an agency determines that other important policy goals cannot be achieved consistent with the Buy America requirements established by the Act.” Implementation Guidance at 10. The guidance also recognizes several instances in which Federal agencies may consider issuing a public interest waiver and encourages agencies to consider an adjustment period where time-limited waivers would allow recipients and agencies to transition to new Buy America preferences, rules, and processes. *Id.* at 11.

Since enactment of the Bipartisan Infrastructure Law, DOT has received numerous inquiries and comments from recipients raising concerns about the applicability of the new construction materials requirement to projects that already are under construction or are in advanced stages of planning. For example, a large West Coast transit system asked whether its projects already under construction could continue to comply with Buy America requirements as they existed at the time of contract award, or if they would be affected by the new domestic preference for construction materials. A large northeastern transit system similarly asked how the construction materials requirement would apply to a major construction project that is underway. The project already has some Federal financial assistance, and the transit system is concerned about the project remaining eligible for additional grant awards on or after November 10.

Some commenters on the proposed temporary waiver for construction materials issued by DOT in April and on the RFI issued in July also described problems that would arise if DOT were to apply the construction materials requirement to projects that have been under development or construction prior to the expiration of the temporary waiver on November 10.

For example, the Santa Clara Valley Transportation Authority asked whether the construction materials requirement will apply to construction contracts that it already has executed under pre-award authority for a project in the Federal Transit Administration's (FTA) Expedited Project Delivery Pilot Program, which may receive an FTA grant that would be awarded on or after November 10.¹ The New York Metropolitan Transportation Authority requested that DOT waive the construction materials requirement for, *inter alia*, (a) any contracts awarded during the waiver period, and (b) any contracts executed during the DOT waiver period using pre-award authority if they are funded by grants awarded after the waiver period.² Capital Metro requested that contracts awarded before the construction materials requirement takes effect be allowed to comply with Buy America standards as they existed at the time the contract was formed, even if the contract is funded by grants obligated in subsequent years.³

Several State departments of transportation expressed similar concerns in their submissions to the docket. For example, the New Jersey Department of Transportation commented that redesigning projects that are in an advanced state of design could be expensive and negatively affect project delivery and requested that such projects be exempt from the new construction materials requirement.⁴ Similarly, the South Dakota Department of Transportation commented that it is not appropriate or feasible to apply the construction materials requirement to projects where bids were already submitted, and contracts awarded, based on using materials

¹ Comment from the Santa Clara Valley Transportation Authority (Aug. 16, 2022), <https://www.regulations.gov/comment/DOT-OST-2022-0047-0122>.

² Comment from the New York Metropolitan Transportation Authority (May 13, 2022), <https://www.regulations.gov/comment/DOT-OST-2022-0047-0037>.

³ Comment from the Capital Metropolitan Transportation Authority (May 13, 2022), <https://www.regulations.gov/comment/DOT-OST-2022-0047-0049>.

⁴ Comment from the New Jersey Department of Transportation (Aug. 12, 2022), <https://www.regulations.gov/comment/DOT-OST-2022-0047-0111>.

with no country-of-origin specifications; doing so would possibly require cancelling current contracts and would add delay and additional costs for project sponsors.⁵ The California Department of Transportation reported that it has many multi-year contracts in place that incorporate Buy America standards as they existed before BABA and asked whether these contracts will remain eligible for Federal grants obligated on or after November 10.⁶

Additionally, a joint comment submitted by the transportation departments of Idaho, Montana, North Dakota, South Dakota, and Wyoming requested that DOT not apply the new construction materials requirement to projects where bids were already submitted and awarded without country-of-origin requirements, because doing so could require project sponsors and contractors to cancel orders or cancel contracts and incur additional costs and delays.⁷

Based on these and other inquiries and comments, DOT has identified certain categories of projects for which application of the BABA construction materials requirement after the DOT waiver expires would present significant concerns:

(1) projects that have received DOT financial assistance awards before November 10, 2022—and sometimes even prior to enactment of the Bipartisan Infrastructure Law—that have completed procurements involving construction materials or currently are in the process of soliciting construction contracts, and will receive additional DOT financial assistance that will be obligated on or after November 10, 2022;

(2) projects that will be funded by DOT grants obligated on or after November 10, 2022, for which recipients have exercised DOT-approved pre-award authority before November 10 to execute or solicit construction contracts prior to grant award;

(3) projects that will be funded by DOT credit assistance obligated on or after November 10, 2022, for which recipients solicited construction contracts before May 14, 2022;

⁵ Comment from the South Dakota Department of Transportation (Aug. 18, 2022), <https://www.regulations.gov/comment/DOT-OST-2022-0047-0167>.

⁶ Comment from the California Department of Transportation (Aug. 18, 2022), <https://www.regulations.gov/comment/DOT-OST-2022-0047-0170>.

⁷ Comment from the Transportation Departments of Idaho, Montana, North Dakota, South Dakota, and Wyoming (Aug. 17, 2022), <https://www.regulations.gov/comment/DOT-OST-2022-0047-0132>.

Requiring compliance with the BABA domestic preference for construction materials would be unduly burdensome for projects that already have executed construction contracts, because they already have received DOT financial assistance, are exercising DOT-approved pre-award authority, or will receive DOT credit assistance for activities already in progress.⁸ Under these circumstances, application of the construction materials requirement could compel contract terminations and cause projects to be put on hold while conducting new procurements. Accordingly, application of the construction materials requirement to these categories of projects would result in unacceptable delay, increased project costs, and potential loss of jobs while project construction is paused.

Additionally, for large infrastructure projects, the preparation of solicitations by project sponsors and the preparation of bids and proposals by offerors require significant time and investment, and are based on project design that occurs well in advance of the solicitations. DOT recipients throughout the country have exercised pre-award authority to solicit construction contracts prior to the May 14, 2022, effective date of the construction materials requirement, for which contract award will not occur until on or after November 10. Applicants to DOT's credit assistance programs often have solicitations underway concurrent with the Department's application and creditworthiness reviews. In these instances, amending the specifications of the contract solicitations to impose new requirements that were not previously applicable would cause considerable delay.

PROPOSED WAIVER AND REQUEST FOR COMMENTS

DOT recognizes the importance of ensuring the use of domestically produced construction materials on infrastructure projects receiving Federal assistance and the need to implement the requirement in a way that does not delay delivery of projects that were

⁸ For information related to pre-award costs, see 2 CFR 200.458, "Pre-award costs." Some DOT OAs have program-specific guidance on pre-award authority, including FTA's "Notice of FTA Transit Program Changes, Authorized Funding Levels and Implementation of the Infrastructure Investment and Jobs Act; and FTA Fiscal Year 2022 Apportionments, Allocations, Program Information and Interim Guidance", 87 Fed. Reg. 25362 (April 28, 2022).

sufficiently advanced before the requirement applies to DOT funding. Therefore, for DOT awards obligated on or after the effective date of the waiver, DOT proposes to issue a general public interest waiver of BABA's domestic preference for construction materials for:

- (1) Any contract entered into before November 10, 2022; and
- (2) Any contract entered into before March 10, 2023, if the contract results from a solicitation published prior to May 14, 2022.

In these limited circumstances, DOT recipients incurred costs, executed contracts, are conducting procurements with long lead times prior to the BABA construction materials requirement taking effect, though they will seek Federal reimbursement through grants obligated on or after November 10, 2022. This proposed waiver would preserve the eligibility of costs a project sponsor already incurred or estimated before the construction materials requirement took effect. The purpose of covering contracts through March 10, 2023, for contracts resulting from solicitations published before the May 14, 2022, BABA effective date, is to provide recipients with reasonable time to complete procurements. Project sponsors and offerors have invested significant resources in such procurements, which are based on design and engineering conducted before the BABA construction materials requirement went into effect. A project sponsor whose solicitation does not result in a contract before March 10, 2023, would have to take such measures as may be necessary to ensure that its contract will comply with the construction materials requirement.

If issued, this waiver would apply only to projects funded by DOT financial assistance obligated on or after the effective date of the waiver. DOT financial assistance obligated before the expiration of the temporary DOT waiver on November 10, 2022 is not subject to the BABA's construction materials requirement.

DOT requests comments on the applicable dates proposed in this waiver. DOT also requests comments on whether this waiver should be time-limited or phased for certain long-term contracts.

In order to support a more efficient and targeted process for future waivers, DOT requests comment on whether there are other scenarios where project delivery would be significantly disrupted or delayed because of circumstances such as the level of design and engineering for a project that has occurred in relation to the effective date of the construction materials preference and provide specific information as to the construction materials which may not be available. For example, are there specific circumstances that may justify a project specific waiver, such as the unavailability of specific construction materials manufactured in the United States in sufficient quantity or quality for a particular DOT-funded transportation project or category of projects? Additionally, are there transportation projects, such as projects in various stages of FTA's Capital Investment Grants program, for which a waiver may be justified due to significant delay in project delivery. If completed design and engineering must be revised to comply with the construction materials preference after November 10, 2022, DOT seeks comments on the length and type of waiver which may be necessary to mitigate a significant delay.

This proposed waiver would apply to infrastructure projects funded by financial assistance administered by the Office of Secretary of Transportation or any of DOT's Operating Administrations with financial assistance programs, including the Federal Aviation Administration (FAA); the Federal Highway Administration (FHWA); the Federal Motor Carrier Safety Administration; the Federal Railroad Administration (FRA); the Federal Transit Administration (FTA); the Maritime Administration (MARAD); the National Highway Traffic Administration (NHTSA); and the Pipeline and Hazardous Materials Safety Administration (PHMSA).

This proposed waiver would not affect any domestic preference requirements under other authorities, including DOT's non-BABA domestic preference statutes: 49 U.S.C. § 50101 (FAA); 23 U.S.C. § 313 (FHWA and NHTSA); 49 U.S.C. § 22905(a) (FRA); 49 U.S.C. § 5323(j) (FTA); and 46 U.S.C. § 54101(d)(2) (MARAD).

The Implementation Guidance also provides that, before granting a waiver in the public interest, to the extent permitted by law, agencies shall assess whether a significant portion of any cost advantage of a foreign-sourced product is “the result of the use of dumped steel, iron, or manufactured products or the use of injuriously subsidized steel, iron, or manufactured products.” Implementation Guidance at p. 12. E.O. 14005 at Section 5 includes a similar requirement for “steel, iron, or manufactured goods.” However, because the public interest waiver that DOT is proposing in this notice is not based on consideration of the cost advantage of any foreign-sourced steel, iron, or manufactured product content, there is not a specific cost advantage for DOT to consider.

DOT will consider all comments received in the 15-day comment period, as required by section 70914(c)(2) of the BIL. DOT will consider comments received after the comment period to the extent practicable.

Issued in Washington, DC on: November 8, 2022.

Polly E. Trottenberg,

Deputy Secretary.

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